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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term 1994

Edward J. Petrus, Jr.

Petitioner

v.

United States of America

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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Petitioner Pro Se

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWARD J. PETRUS, JR.	)	
	)	
v.	)	A-92-CA-182 SS
	)	
UNITED STATES OF AMERICA	)	

Order

Be it remembered on the 2 day of June, 1993, came on to be heard and considered Edward J. Petrus, Jr.'s "Motion to Vacate, Set Aside, or Correct Sentence," under 28 U.S.C. § 2255. Having considered the motion, reviewed the file and considered the arguments, the evidence and the subsequent briefs, the Court believes the motion should be denied.

On May 5, 1985, Petrus pled guilty to the federal offenses of submitting a false Medicare Claim in violation of 42 U.S.C. § 1395nn(a)(2); submitting a false Medicaid Claim in violation of 42 U.S.C. § 1396h(a)(2); and obstruction of justice in violation of 18 U.S.C. § 1503, and was sentenced to nine years imprisonment.[1] He did not file a direct appeal of his sentence. He did, however, file a motion to reduce his sentence pursuant to Fed. R. Crim. P. 35(b). The district court denied relief and the Fifth Circuit affirmed.

On July 18, 1986, Petrus filed his first "Motion to Vacate, Set Aside, or Correct Sentence" under 28 U.S.C. § 2255. In his

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[1]Petrus pled guilty to 3 counts - counts 10, 24 and 31 - of a 36 count indictment. The remaining counts were dismissed on motion by the government.

first motion, Petrus alleged his pleas of guilty were not entered knowingly and voluntarily and he had ineffective assistance of counsel. The district court referred the motion to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, effective March 1, 1982, for a report and recommendation. The Magistrate Judge conducted an evidentiary hearing and issued a written recommendation that the motion be denied. The district court, after conducting a de novo review, adopted the Magistrate Judge's recommendation and denied Petrus' motion. Petrus appealed to the Fifth Circuit which affirmed the district court's judgment in an unpublished written opinion. See, United States of America v. Petrus, No. 87-1932, filed December 1, 1988.

On April 1, 1992, Petrus filed the instant "Motion to Vacate, Set Aside, or Correct Sentence" pursuant to 28 U.S.C. § 2255; his second such motion relating to his 1985 conviction. In this motion, Petrus claims:

> (1) his conviction under 18 U.S.C. § 1503 was improper because attempting to persuade the testimony of a witness is not a violation of § 1503;
>
> (2) his convictions for Medicare and Medicaid were improper because his actions did not constitute criminal violations, but rather were civil in nature;
>
> (3) his Medicare and Medicaid suspension violated due process and the double jeopardy clause; and
>
> (4) his plea was involuntary and the government violated the terms of the plea agreement.

28 U.S.C. § 2255 provides a procedure whereby an individual may challenge a federal conviction. It states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Section 2255 requires that the petitioner be "in custody." Petrus was out of prison at the time he filed this motion. He was, however, still on parole. One on parole is "in custody" within the meaning of Section 2255. See, U.S. v. Drobney, 955 F.2d 990, 995-996 (5th Cir. 1992). The Court is informed his parole expires July 1993.

The government argues Petrus' motion should be dismissed pursuant to Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District Copurts, 28 U.S.C. foll. § 2255, because Petrus has failed to raise grounds that are new or different than those previously determined, and to the extent the grounds now raised could be considered new or different, they should be dismissed as an abuse of the writ. Furthermore the government argues, even if the Court reaches the merits of the motion, the motion should be denied. See, "Government's Supplemental Response to Motion to Vacate, Set Aside, or Correct Sentence" filed June 15, 1993, 3.

Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. foll. § 2255 provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that

> the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

In "ground four" of his motion, Petrus asserts his plea was involuntary and the plea agreement was violated by the government. To support this assertion he states his "attorney did not understand what conduct was proscribed to violate the Medicare/ Medicaid fraud statutes" and "[a]ny guilty plea was involuntary because it was based on erroneous advice of his attorney." See, "Motion to Vacate, Set Aside, or Correct Sentence" filed April 1, 1992, 6. These same grounds were raised in his first Section 2255 motion and rejected on the merits. The Fifth Circuit in affirming the district court's denial of Petrus' motion stated: "Based on the foregoing, Petrus' plea was truly voluntary. He was properly and adequately advised of the nature and elements of the charges against him, and he freely admitted doing what he was charged with in both the indictment and the factual basis." See, Fifth Circuit Opinion, United States of America v. Edward Joseph Petrus, Jr., filed December 1, 1988, 12. The Fifth Circuit likewise rejected his claims of ineffective assistance of counsel. See, Id. 12-19. Since these are the same grounds he raised in his prior Section 2255 motion and the prior motion was decided on the merits, he is precluded from raising these grounds again. See, Rule 9(b), Rules Governing Section 2255 Proceedings for the United States District courts, 28 U.S.C. foll. § 2255.

Rule 9(b) also provides that a Section 2255 motion may be dismissed for abuse of the writ but does not define what constitutes "abuse." The Fifth Circuit addressed this issue in U.S. v. Flores, 981 F.2d 231 (5th Cir. 1993). Relying on McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (1991), the Fifth Circuit stated that a second or subsequent Section 2255 motion which raises a claim for the first time is generally regarded as an abuse of the writ. See, Flores, 981 F.2d at 234. quoting McCleskey, 112 S.Ct. at 1457. However, the failure to raise a ground for relief in the initial motion "will be excused if the petitioner can show (1) cause

for his failure to raise the claim, as well as prejudice from the errors which form the basis of his complaint; or (2) that the court's refusal to hear the claim would result in a fundamental miscarriage of justice." Flores, 981 F.2d at 234.

The first way to avoid dismissal under Rule 9(b) is to show cause and prejudice. "The 'cause' prong of this standard requires the movant to show that some objective factor external to his defense prevented him from raising the claim in his initial [Section 2255] motion." Id. at 235. Governmental interference is an example of an objective factor external that will satisfy the "cause" requirement. Id at 236. Ignorance of the law and/or facts underlying the petitioner's claim, however, does not constitute "cause" because neither is an objective external factor to his defense. Id. Furthermore, a petitioner's pro se status does not constitute "cause." id. Petrus claims he was ignorant of the law and/or facts at the time of initial motion. As stated, however, this does not constitute "cause." Petrus has not shown "cause" for failing to raise any of his claims in his initial Section 2255 motion. The Court, therefore, does not need to decide whether he has shown prejudice.

Although Petrus has not shown cause and prejudice, the court will hear his claims if failing to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice exists if a constitutional violation probably caused Petrus to be convicted of a crime of which he is innocent. Id. Grounds One and Two are not constitutional in nature and thus do not rise to the level of constitutional violations.[3] Ground Three is constitutional in nature. However, Petrus does not contend he is innocent

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[3]Furthermore, the Fifth circuit has held that 18 U.S.C. § 1503 makes it a crime for anyone to intentionally urge or advise a witness to testify falsely. See, U.S. v. Williams, 874 F.2d 968, 977 n. 25. (5th Cir. 1989)

in Ground Three.[2] He only contends his Medicaid suspension violated double jeopardy, the alleged delay in implementing his suspension from Medicare was a violation of due process, the Department of Health and Human Service's alleged "bounty system" precluded a fair hearing threrby violating Petrus' due process rights, and the government breached the suspension agreement "and any violation regarding the suspension was invalid." Since Petrus does not contend he is innocent, his "motion does not fit within the narrow category of Section 2255 proceedings which implicate a fundamental miscarriage of justice" and will be dismissed. Id.

IT IS ORDERED that Edward J. Petrus' "Motion to Vacate, Set Aside, or Correct Sentence" is DENIED and DISMISSED.

IT IS FURTHER ORDERED that this is a final order in this cause.

Entered the 29th day of June, 1993.

Sam Sparks United States District Judge

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[2]Petrus does contend he is innocent of the Medicare and Medicaid fraud offenses, 42 U.S.C. § 1395nn and 1396h. Petrus asserts he is innocent because his provider authority had been suspended and therefore he could not, as a matter of law and as he construed the position of the United States in his civil litigation, be criminally responsible. However, it was a violation of these statutes for an individual to "knowingly and willfully make[] or cause[] to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment." Requesting payment when the individual knows he is not entitled to payment would violate the statutes. Petrus knew he was on suspension and not entitled to payment. He therefore violated the statutes when he requested payment, albeit under another provider's number.